In the High Court of Uttaranchal at Nainital.

Criminal Jail Appeal No. 176/2002

Harish Ram @ Rangila
S/o Sher Ram
R/o village Punedi, P.S. Kotwali Pithoragarh
District Pithoragarh .....Appellant.

Vs.

State of Uttaranchal ....Respondent.

Sri L.K. Tiwari, Amicus Curiae for the appellant.
Shi H.C. Pandey, learned A.G.A. for the respondent.

Date: 08-07-2004

ORAL JUDGMENT **(Per: Hon'ble Mr. Justice Irshad Hussain)**

The above named appellant was charged and convicted under section 376 of the Indian Penal Code for committing rape on Km. Vineeta Burphal aged about 9 years at about 3.00 p.m. on 7-8-2000 in the vicinity of village Tildukri of P.S. Kotwali, Pithoragarh. He was sentenced to undergo R.I. for 7 (seven) years together with fine of Rs. 2000/- per judgment dated 18-2-2002 passed by the then Sessions Judge, Pithoragarh in sessions trial no. 38 of 2000.

2- The case of the prosecution is that the victim Km. Vineeta Burphal was a student of class-IV of Primary School, Tildukri. On 7-8-2000 at about 3.00 p.m. she went to ease herself in the vacant land near the school building. The victim was over-powered by a miscreant and was forcibly raped. She sustained injury in her private part and started bleeding. She came back to her class with difficulty and was writhing in pain. On being told about the incident the head mistress and other school teachers went to the site of the incident but the rapist had by then ran away from there. The high rise grass at the site of the incident was found crushed and blood stained. The maternal aunt (Mausi) Devki Devi was summoned to the school and was told about the incident. Head mistress prepared the written report (Ext.Ka.1) and filed it at the P.S. Kotwali Pithoragarh at 4.35 p.m. the same day and a case under section 376 I.P.C. was registered. The investigation was taken up by S.S.I. Sri Ashok Kumar Arora but lateron Deputy S.P. Sri Prem Singh Sanga was entrusted with the investigation of the case.

3- On 12.8.2000 Sri Sanga visited the site of the incident in the presence of the victim and others and while inspecting the site was able to lay hands on a small booklet, spoiled with mud, in the bushes. On being cleaned it was found to be a ration-card no. 069277 belonging to Harish Ram S/o Sher Ram and having the photograph of the said head of the family. This piece of evidence gave a lead and Harish Ram was arrested on 13-8-2000 and was taken 'baparda' to the police station so that he may be put to test identification to affirm his involvement.

4- On 25-8-2000 S.D.M. Sadar, Pithoragarh Sri Subhash Chandra Uttam conducted the test identification proceedings. Km. Vineeta Burphal correctly identified Harish Ram alias Rangila and thereafter on completion of the investigation charge sheet was submitted against him on 26-8-2000.

5- Cognizance was taken against the said appellant and he was committed to court of Sessions and was ultimately convicted and sentenced as mentioned above.

6- At the trial appellant pleaded not guilty and refuted the accusation of the prosecution. According to him ration-card belonging to him was procured by the police from his wife and further that his arrest was effected on 11-8-2000 and his clothes were removed and attached by the police on that very day.

7- In the trial the prosecution sought to prove the charge against the appellant by examining 13 witnesses. Out of these Smt. Devki Devi (P.W.1) is the maternal aunt of the victim with whom the victim was residing at the time of the incident. This witness was informed of the incident and on reaching the school found her niece bleeding from private part on account of injury sustained as a result of rape as stated to by the victim.

8- Km. Vineeta (P.W.2) is the victim of the case. She was aged about 9 years at the time of incident. She narrated the incident as reproduced above and also identified the appellant in the dock, as the person who committed rape on her. She corroborated the result of the test identification in which the appellant was correctly identified by her. She gave out that she had seen the appellant for the first time at the time when she was raped and thereafter in the test identification

parade. She denied to the suggestion that she was shown the photograph of the appellant before the test identification parade. According to the witness she had also noticed tattoo mark on the right hand of the rapist at the time of incident. It was verified that the appellant had figure of Hanuman Ji tattooed on the right hand. The witness vehemently denied to the suggestion that she had sustained injury on her private part when she had a fall and was hurt by a wood stick while playing with other students. She also testified that the appellant was at the time of the incident wearing a red shirt and black pant.

9- Smt. Lila Kothari (P.W.3) the head mistress of the Primary School proved the written report (Ext.Ka.1) prepared and lodged by her at the police station. She also denied to the suggestion as was made to the victim.

10- Dr. Nirmala Punetha (P.W.4) medically examined the victim Km. Vineeta the same day at 6.00 p.m. in Female Hospital, Pithoragarh and prepared medical examination report (Ext.Ka.2). Km. Vineeta was found to be bleeding from her vagina and blood clots were passing out. There was a perineal tear present which extended about 2.5 cm in length. Hymen was found torned and vagina was injured. In the opinion of the Medical Officer sexual assault has been made on the said victim. Her skirt and under clothes were attached by the Medical Officer. Vaginal smear was taken and sent for pathological examination. The victim was admitted in the hospital for treatment and the perineal tear was stitched and bleeding from the vagina was thus controlled.

11- Smt. Meena Devi (P.W.5) a resident of the town of Pithoragarh claimed that she knew the appellant very well as she had been treating him as her brother. She gave out that about two years ago when she went to the house of the appellant with her daughter to tie the ‘Rakhi’ on the hand of the appellant then on that day her daughter Mamta identified the appellant as the person who had forcibly taken the victim towards the site of the incident. The witness was examined to connect the appellant with the incident of the case.

12- Smt. Niranjan Pant (P.W.6) a teacher in the Primary School had also visited the site of the incident and found the high rise grass

being crushed at the place where the rape was committed on the victim and blood was also found lying there.

13- Umesh Ram (P.W.7) is the witness of extra-judicial confession made by the appellant after the incident when this witness happened to accompany the appellant to Tiloti village from Chandak in the district of Pithoragarh and when they stayed together in the night at the house of Hosiyar Ram. According to the witness the appellant had borrowed a sum of Rs. 100/- from Hosiyar Ram and next day took Rs. 50/- from Madan Ram of Tiloti and also took clothes for change while the appellant was wearing a black pant and red shirt. Hosiyar Ram (P.W.8) was examined to corroborate the evidence of above witness.

14- Sri Subhash Uttam (P.W.9) the Sub Divisional Magistrate, Sadar Pithoragarh on 25-8-2000 held the test identification parade. This witness proved the steps taken to have the parade arranged and also testified that witness Km. Vineeta Burphal had correctly identified the culprit (appellant) Harish Ram alias Rangila Identification memo (Ext.Ka.3) was prepared by him at that time.

15- Madan Ram (P.W. 10) was also examined to support the evidence of witness of extra-judicial confession and also to prove that sum of Rs. 50/- was taken by the appellant and that he gave a pant and shirt to the appellant for change of the clothes. The appellant had then kept with him his black pant and red shirt and went away. The appellant had also told him that the police was searching for him and it will not be proper for him to go back to Pithoragarh and giving this reason the appellant proceeded for village Dasai Thal where the maternal uncle of the appellant was residing.

17- Sri Prem Singh Sanga Deputy S.P. (P.W.11) was entrusted the investigation of the case on 9-8-2000. He inspected the site on 12-8-2000 and as stated above picked up the ration-card from near the scene of the incident which was found to be belonging to the appellant and it was taken as a lead to arrest the appellant and put him thereafter to test identification. Ext.Ka.6 the memo of seizure of the ration-card was proved by this witness along with other documents viz. the site plan (Ext.Ka.5), memo of arrest and seizure of the clothes of the appellant (Ext.Ka.7) and the charge sheet dated 26-8-2000 (Ext.Ka.9) submitted against the appellant.

18- S.S.I. Sri Ashok Kumar Arora proved the other part of the investigation which was initially done by him. Sri Lakshmi Dutt Bhatt (P.W.13) formally proved the G.D. report of 13-8-2000 regarding submission of the appellant in 'Hawalat' after his arrest on 13-8-2000 and the same is Ext.Ka.12 on the record.

19- In defence Smt. Meena (D.W.1) wife of the appellant was examined in order to support the defence version that the appellant was picked up from his house on 11-8-2000 and his ration-card was also taken away by the police. She is reported to have made a complaint with the Human Rights Commission but nothing was brought on record to indicate that soon after the said date of alleged arrest of the appellant she made a complaint to higher officers.

20- Learned Sessions Judge made critical analysis of the evidence in the case and on the basis of his appreciation came to the conclusion that from the evidence on record it has been proved beyond doubt that the rape had been committed on the victim Km. Vineeta Burphal on the date and time as alleged by the prosecution and further that from the evidence the identity of the appellant as the rapist has been established and the appellant was accordingly held guilty and convicted as aforesaid.

21- I have heard learned Amicus Curiae and the learned A.G.A. and have gone through the judgment under appeal with the help of the learned counsel and have considered the circumstances and the probabilities of the case.

22- Learned Amicus Curiae appearing on behalf of the appellant very fairly submitted that from the statement of the victim Km. Vineeta Burphal and the medical evidence on record as referred above it is proved beyond doubt that the said victim was subjected to forcible rape and further that the victim was a minor aged about 9 years. Learned Amicus Curiae however submitted that the learned Sessions Judge made an error in appreciation of the evidence in regard to the identify of the culprit and wrongly placed reliance on the identification evidence as well as the evidence of extra-judicial confession. Having considered the submission in the light of the evidence on record it need to be stated that there is no merit in the submission of the learned Amicus Curiae and no interference in the

judgment of conviction and sentence passed against the appellant is warranted.

23- The reasons are that the occurrence took place during the day time and the victim Km. Vineeta Burphal has had full opportunity to see the broad features of her rapist as may facilitate the identification of the culprit later-on. The seizure of ration-card belonging to the appellant gave a lead and appellant was apprehended. It was submitted by the learned Amicus Curiae that the evidence of the Investigating Officer, Sri Prem Singh Sanga (P.W.3) is weak and infirm so far as the seizure of the ration-card from near the scene of the incident vide memo (Ext.Ka.6) is concerned. Attention was drawn to the fact that the site was earlier inspected by the first Investigating Officer, S.S.I. Ashok Kumar Arora (P.W.12) on 7-8-2000 and the site-plan (Ext.Ka.10) was also prepared and if any ration-card was lying near the site of the incident the same could have been seized on that very day and that from the facts and circumstances of the case it clearly appear that the ration-card was some how procured to implicate the appellant in the case. I see no substance in this argument because the ration-card spoiled with mud was found lying at a short distance from the site of the incident on 12-8-2000 by the second Investigating Officer and there was every probability that when the first Investigating Officer visited the site he could not make proper and searching inspection of the site of the occurrence and the vicinity of the same and the ration-card lying in the bushes or in the high rise grass could not then be seen by him. There is nothing in the cross-examination of Sri Prem Singh Sanga (P.W.11) as may indicate that the article was not found from near the site of the incident by him and therefore in the totality of the circumstances of the case the recovery and attachment of the ration-card of the appellant could not be viewed with suspicion or disbelieved. In this connection it is also significant that although D.W.1, Smt. Meena gave out that the ration-card was picked up from her house on 11-8-2000 but there is nothing to indicate that any complaint was made to this effect to the higher officers. This witness also claimed that her husband was also taken away on that day after assault by the police but still the matter was not reported to higher officers for any action against them and therefore

this aspect of the matter also not only indicate that the defence evidence is not reliable but also shows that the evidence of the prosecution has not been successfully assailed. Learned Amicus Curiae pressed into service the reported decision of the Apex Court in criminal appeal in the matter of **Jaspal Singh @ Pali and Darshan Singh and others vs. State of Punjab; 1997 Supreme Court Cases (Cri) 358** in support of the submission that when a culprit to an offence is unknown, to connect a person with the offence a strong piece of evidence is required. In the reported case the miscreants were unknown and there was allegation of trespass into the house where-after money was demanded and son of the house owner was taken away and thereafter was shot dead. During investigation a wallet containing a photograph of one of the accused persons was seized from the kitchen garden of that house and taking it as a lead the said accused on the basis of the photograph was arrested and arraigned as an accused in the case. The designated court placed reliance on this piece of evidence and conviction was recorded. On appeal the Apex Court did not accept the reasoning and on finding that the said evidence to connect the accused with the crime being weak he judgment of conviction was set aside and the accused was acquitted. In the said reported case the test identification of the accused was not held and the accused was identified for the first time in trial court. The facts of the reported case are at variance in as much as in the instant case the ration-card which was taken as a piece of evidence to connect the appellant with the alleged offence was also put up to test identification and was correctly identified by the victim Km. Vineeta Burphal and further that the evidence of recovery of the ration-card from near the site of the incident being reliable it shall not be safe to hold that this was, in the facts and peculiar circumstances of the case, weak piece of evidence. Therefore, the reported decision also is of no help to the cause of the appellant and it does not support the submission made by the learned Amicus Curiae.

24- Since the reference has been made to the evidence of identification it need to be stated that the evidence of P.W.9, Sub Divisional Magistrate, Sri Subhash Uttam is definite on the point that the test identification parade of the appellant was arranged and held

after taking every due precaution and there is nothing in his cross-examination as may in any way distract the court as to take a contrary view regarding the reliability of his evidence in that regard. Coupled with this the evidence of the victim Km. Vineeta Burphal is also definite and positive that she had seen the appellant for the first time when she was raped and subsequently in the test identification parade and that the appellant was not seen by her during the intervening period. The witness was suggested that the photograph of the appellant was shown to her before test identification but she vehemently denied the same. There is nothing on record to entertain any doubt in the veracity of the evidence of the witness that there was nothing wrong in the proper holding of the test identification parade and identification of the appellant by the witness as the culprit. Not only this the victim had also observed a tattoo mark on the right hand of the rapist at the time of the incident and it was duly verified when it was observed that figure of Hanuman Ji was tattooed on the right hand of the appellant. This was an additional feature which helped in fixing the identify of the culprit and therefore the evidence of the victim was sufficient enough to prove that none other than the appellant had committed rape on her on that day.

25- So far as the evidence of Smt. Meena (P.W.5) is concerned I find force in the argument of the learned Amicus Curiae that this witness appear to be a got up witness and was produced to show that her daughter had pointed to her that on the day of occurrence the appellant took the victim for committing the rape. The reason is that it was not the prosecution case that the victim was forcibly taken towards the vacant land having high grass in the presence of other school girls and therefore the daughter of this witness could have pointed out that the appellant was the person who had forcibly taken the victim towards the site of the incident on that day.

26- However the evidence of extra-judicial confession as given by Umesh Ram (P.W.7) and Madan Ram (P.W.10) appear convincing because Umesh Ram happened to accompany the appellant on the day of incident when the appellant after the incident wanted to hide himself by visiting the house of his maternal uncle and had then told the witness that the police was after him as he has committed the

offence of rape. The appellant also took money from Hosiyar Ram and witness Madan Ram (P.W.10) and also was successful in getting a pair of trouser and shirt for change so that he may not be identified by his clothes which he was wearing at the time of the commission of the offence of rape. It has come in the evidence of the victim that the culprit at the time of the incident was wearing red shirt and black pant. These clothes were changed by the appellant after he was successful in getting the clothes from witness Madan Ram so that he may conceal his identity for some time. Witness Madan Ram (P.W.10) gave out that when the appellant came to his house with witness Umesh Ram (P.W.7) he was wearing red shirt and black pant and got these changed after taking clothes from him. Later on the appellant was arrested on 13-8-2000 while wearing his own red shirt and black pant which were attached by the police vide memo (Ext. Ka.7). The evidence of these witnesses therefore also indicate that at the time of the incident the appellant was wearing the above clothes and this feature was very well observed not only by the victim Km. Vineeta Burphal but also by the above witnesses Umesh Ram and Madan Ram and their evidence also sufficiently connect the appellant with the offence of rape committed by him with the victim of the case. There is nothing wrong in placing reliance on this evidence by the learned Sessions Judge and the submission of the learned Amicus Curiae that, the appellant had been found guilty on insufficient and on the basis of inadmissible evidence, carry no conviction and acceptance.

27- For the reasons aforesaid and the evidence as observed above I come to the definite conclusion that the prosecution has been able to establish that it was the appellant who committed rape on the victim Km. Vineeta Burphal at about 3 p.m. on 7-8-2000 in the vicinity of village Tildukri of P.S. Kotwali, Pithoragarh and the charge under section 376 I.P.C. was rightly found established against him by the learned Sessions Judge. The conviction and sentence passed against the appellant per judgment dated 18-2-2002 are fit to be affirmed.

28- In view of above the appeal is dismissed and the judgment dated 18-2-2002 convicting the appellant and sentencing him to undergo R.I. for 7 (seven) years and a fine of Rs. 2,000/-

(two thousand) and in default of payment of fine to further undergo S.I. for 3 (months) is affirmed. The appellant is in jail. He shall serve out the sentence as awarded against him.

The Amicus Curiae shall be paid fee prescribed.

(Irshad Hussain, J.)

I.S.B.